

## CLEAN ECONOMY COALITION

January 3, 2011

Ms. LaDonna Castanuela  
Chief Clerk, MC 105  
Texas Commission on Environmental Quality  
P. O. Box 13087  
Austin, Texas 78711-3087  
Fax: (512) 239-3311

Re: TCEQ Docket No. 2009-033-AIR and SOAH Docket No. 582-09-2005; Application of Las Brisas Energy Company, LLC. for State Air Quality Permits Nos. 85013, HAP 48, Pal 41 and PSD-TX-1138.

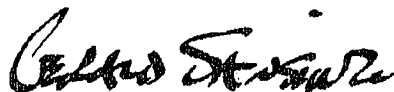
Dear Ms. Castanuela:

Enclosed for filing in the above referenced cause is the Clean Economy Coalition's Reply to Executive Director's Exceptions to the December 1 PFD.

By my signature below, I certify that a copy of this filing has been served on Judge Bennett and Judge Broyles, and the parties to this matter (List Attached).

Please call me at (361) 855-7051 if there are any questions about this filing.

Yours Very Truly,



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COMMISSION  
ON ENVIRONMENTAL  
QUALITY

JAN -3 PM 4: 25

APPLICATION OF LAS BRISAS  
ENERGY CENTER, LLC  
FOR STATE AIR QUALITY PERMIT:  
NOS. 85013, HAP48, PAL41,  
AND PSD-TX-1138

\* BEFORE THE STATE OFFICE CLERKS OFFICE  
\*  
\* OF  
\*  
\* ADMINISTRATIVE HEARINGS

**CLEAN ECONOMY COALITION'S REPLY TO EXECUTIVE DIRECTOR'S  
EXCEPTIONS TO THE DECEMBER 1 PFD**

**TO: THE HONORABLE ADMINISTRATIVE LAW JUDGES BROYLES AND  
BENNETT, AND THE COMMISSIONERS OF TCEQ.**

NOW COMES THE CLEAN ECONOMY COALITION, (CEC) and files its reply to the  
Executive Director's (ED's) exceptions to the Proposal for Decision (PFD) on Remand, issued  
by the Administrative Law Judges (ALJs) December 1, 2010.

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**I. ED's exceptions misstate resolution of issues by agreement**

The ED is under the mistaken impression that there has been agreement between the  
parties on key disputed issues. There has been no agreement by CEC and its aligned parties on  
the disputed issues of mercury BACT limits, PM<sub>10</sub> BACT limits, PM<sub>2.5</sub>, MACT analysis failure,  
PSD modeling, and a host of other issues raised by all protestants during the contested case  
hearing. There has been no attempt at dialog on the part of the ED, or the Applicant, with the  
Protestants. On the contrary, LBEC and the ED have steadfastly refused to deal with the serious  
environmental issues confronting the welfare of the people of the Coastal Bend, their health, and  
safety.

**II. ED's violation of Texas Water Code sec. 5.228 and TAC Rule 80.108 (d) and (e)**

The ED has continued throughout this contested case to attempt (albeit unsuccessfully) to assist LBEC in meeting its burden of proof to insure that LBEC is using the best available control technology (BACT), and that there is no indication that emissions from the facility will contravene the intent of the Texas Clean Air Act<sup>1</sup>. In this case, despite overwhelming evidence that LBEC failed to meet its burden of proof on key issues in a nine day hearing in November, 2009<sup>2</sup>; the ED (who admitted some, but not all of LBEC's failure), continues to try to assist LBEC in meeting its burden of proof and justifies its actions by relying on 30 TAC sec. 80.118<sup>3</sup> to imply that its actions were "necessary parts of the Administrative Record"<sup>4</sup>. What the ED ignores, is the direct language of Texas Water Code Sec. 5.228 (e), which prohibits such assistance<sup>5</sup>; as well as the rules of 30TAC, Rule 80.108 (e), which specifically states: "*When the executive director participates as a party in a contested case hearing concerning a permitting matter before the commission or SOAH, the executive director may not assist an applicant in meeting its burden of proof unless applicant is eligible to receive assistance because: (1) the applicant is a qualifying governmental entity; or (2) the applicant is a non-profit entity; ...*". (Italics supplied). When the March 29 PFD by the ALJ's came up for hearing before the Commissioners on June 30, 2010, the ED, instead of recommending that the Application be referred back to the TCEQ for additional technical review, recommended that issues in the contested case that had been resolved against LBEC, be returned to SOAH to give LBEC another chance to produce additional evidence, which it did. See Applicant's pre-filed testimony and exhibits. Not only did LBEC hire two new experts, David Cabe and Kevin Ellis, but produced two "hypothetical" scenarios for material handling (LBEC Exhibits 702 and 703), which it does not now care to be bound by.<sup>6</sup> When even the new modeling by Kevin Ellis<sup>7</sup> proved deficient, the ED went further, and relied on its staff to "correct" the errors, and provide a basis for recommending the permit. By any reasonable analysis, (and the ALJs found) the actions by the

<sup>1</sup> The Texas Clean Air Act, Health and Safety Code, Chapter 382, et seq: Sec. 382.002, "POLICY AND PURPOSE"; Sec. 382.0518 : "PRECONSTRUCTION PERMIT", sub section (b) (1) and (2)

<sup>2</sup> See Administrative Law Judges Broyles and Bennett's PFD March 29, 2010.

<sup>3</sup> The ED places emphasis on TAC sec. 80.118 (6) which includes in the record of a contested case any agency document determined by the executive director to be necessary to reflect the administrative and technical review of the application. ED's Exceptions to the December 1 PFD, p. 4, footnote 7.

<sup>4</sup> ED's Exceptions to the December 1, PFD, p. 7

<sup>5</sup> The ED cites TWC sec. 5.228 (e) in footnote 5, p. 3 of ED's Exceptions to the December 1 PFD

<sup>6</sup> See Applicant's Exceptions to the December 1 PFD, p. 27

<sup>7</sup> LBEC Ex. 704


ED through its air modeling team in assisting the applicant, was a violation of Texas Water Code, section 5.228 (e) and TAC Rule 80.108 (e); and therefore cannot not be considered. To read 30TAC, sec. 80.118 (6), and Texas Government Code section 2001.060 (with similar listing of the contents of the record in contested cases) as overruling the clear language of the statutes forbidding the ED from assisting the applicant in meeting its burden of proof would render the prohibition meaningless.

### III. Conclusion

The Executive Director's Exceptions to the ALJs' December 1, PFD, was issued at the same time as the Applicant's Exceptions, which now make it clear that the two material handling scenarios (LBEC exhibits 702 and 703) were merely "hypothetical", and not intended to be actual, or relied upon.<sup>8</sup> Unfortunately, TCEQ Audit Team leader, Mr. Jamieson, did rely on the scenario involving the "hypothetical" Bulk Dock 3, in his August 25<sup>th</sup> 2010 second modeling audit<sup>9</sup>. In view of the admissions by LBEC in its Exceptions to the December 1 PFD, that it would not be bound by its "hypothetical" and "unrealistic" scenarios, it would be appropriate for the ED to retract his recommendation; and join with protestants in urging the Commissioners to deny the LBEC application for air quality permits.

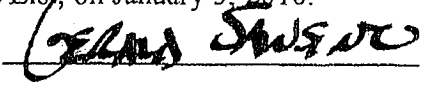
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### Certificate of Service

I certify that copies of the foregoing Reply have been served as indicated on the attached Service List, on January 3, 2010.

  
Gerald Sansing

8

Applicant's exceptions to December 1 PFD, p. 27. Applicant states: "...the hypothetical emissions cannot and will not be authorized in this proceeding." and, "Furthermore the scenarios were designed to be extremely conservative and, accordingly are unrealistic in several respects."

<sup>9</sup> ED Ex. 51, p. 3, directly after Table 1, Mr. Jamieson explained: "The results presented in Table 1 are associated with the BD3 potential construction scenario. Since BD3 is an acceptable scenario, and due to time constraints, the ADMT did not evaluate the BD1 potential construction scenario."

SOAH Docket No. 582-09-2005  
TCEQ Docket No. 2009-0033-AIR  
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CLEAN ECONOMY COALITION

January 3, 2011

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Please call me at (361) 855-7051 if there are any questions about this filing.

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Gerald Sansing, Chairman  
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APPLICATION OF LAS BRISAS \* BEFORE THE STATE OFFICE  
ENERGY CENTER, LLC \*  
FOR STATE AIR QUALITY PERMIT: \* OF  
NOS. 85013, HAP48, PAL41, \*  
AND PSD-TX-1138 \* ADMINISTRATIVE HEARINGS

**CLEAN ECONOMY COALITION'S REPLY TO APPLICANT'S EXCEPTIONS  
TO THE DECEMBER 1 PFD**

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NOW COMES THE CLEAN ECONOMY COALITION, (CEC) and files its  
reply to the applicant, Las Brisas Energy Center, LLC's exceptions to the Proposal for  
Decision (PFD) on Remand, issued by the Administrative Law Judges (ALJs) December  
1, 2010 (referred to herein as "Applicant's Exceptions").

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I. Applicant's Exceptions demonstrate its failure to meet the burden of proof..	
a. Increase in particulate matter above what was modeled.	

The ALJs in their December 1 PFD, concluded that without question,  
there would be an increase in particulate matter over what was modeled by the  
applicant. Now, LBEC argues in its Applicant's Exceptions that this conclusion  
is incorrect, stating: "Specifically, Applicant's theory has always been that 'the  
modeled emissions from the [Port of Corpus Christi Authority ("PCCA")] Dock 2  
permit alone are more than sufficient to cover...emissions necessary to



accommodate the LBEC's material handling needs".<sup>1</sup> This statement demonstrates the fallacy in the applicant's reasoning, because it is based on a false representation of the Port of Corpus Christi Authority (PCCA) Dock 2 permit and the material handling needs of LBEC. It is undisputed that LBEC will require over 7 million tons of pet coke and limestone annually. PCCA Dock 2, if solely devoted to the needs of LBEC (a fact not in evidence), is authorized to handle only 3,150,000 tons of pet coke, and 500,000 tons of limestone annually.<sup>2</sup> Applicant's Exceptions go on to allege that Applicant's burden on remand was simply to demonstrate that the modeled emissions from PCCA Dock 2 are sufficient to cover the emissions necessary to accommodate the LBEC's material handling needs. (See Applicant's Exceptions, p. 4). This argument makes no sense, given the clear contrary evidence in the Port's amended permit.

**b. Applicant's own argument shows failure to meet its burden of proof.**

Applicant's burden of proof was, among other things, to demonstrate by proper air quality modeling that there would be no violation of the 24-hr PM<sub>10</sub> Increment.<sup>3</sup> In order to meet this burden, LBEC proposed two options<sup>4</sup> and goes on to state: "Applicant's modeling resulted in high-second-high values for Option 1 (also referred to as 'Bulk Dock 1') and Option 2 (also referred to as 'Bulk Dock 3')....."<sup>5</sup>

The December 1 PDF is clear that the Executive Director's (ED's) witness, Daniel Jamieson, found in his audit of LBEC's remand testimony that there was not a sufficient demonstration (by the applicant) that there would be no violation of the 24-hr PM<sub>10</sub> Increment, without his additional modeling.<sup>6</sup> The ED's representative, Randy Hamilton agreed that the additional work Mr.

<sup>1</sup> Applicant's exceptions to December 1 PFD, pp. 3-4

<sup>2</sup> Amended permit 9498, for bulk dock 2, May 24, 2010. LBEC Ex. 803, p. 3

<sup>3</sup> Applicant's Remand Closing Argument, p. 2: "With respect to the PM<sub>10</sub> 24-hour increment, Applicant is required to demonstrate that PM<sub>10</sub> emissions from proposed project sources will not cause or contribute to an exceedance of the PM<sub>10</sub> increment of 30 ug/m<sup>3</sup> ....."

<sup>4</sup> LBEC Ex. 702 and 703

<sup>5</sup> Applicant's Remand Closing Argument p. 2.

<sup>6</sup> December 1 PFD, p. 17

Jamieson did, (*in violation of Texas Water Code section 5.228*) was a necessary part of getting the ED's approval of the proposed permit.<sup>7</sup>

LBEC witness, Kevin Ellis, modeled the two "hypothetical" material handling scenarios involving utilization of PCCA bulk dock 1 and a lay berth, referred to in Applicant's Remand Closing Argument as "**Bulk Dock 3**".

Applicant's Exceptions now allege that the scenarios were modeled "strictly for demonstrative purposes...", and it does not care to be bound by either of them as the ALJs required in the December 1 PFD. (see Applicant's Exceptions, page 27). Having admitted that the "scenarios" modeled by its key witness were merely "hypothetical", Applicant is estopped from relying on them for any material purpose.

Daniel Jamieson, in his August 25, 2010 Second Modeling Audit, included a "Table 1, Modeling Results for PSD Increment", with this explanation: "The results presented in Table 1 are associated with the BD3 potential construction scenario."<sup>8</sup> One issue decided by the ALJ's in their December 1, PFD, was that Mr. Jamieson's Audit Report to LBEC constituted improper assistance in helping LBEC meet its burden of proof in this contested case (a violation of Texas Water Code, sec. 5.228)<sup>9</sup>. Applicant's Exceptions, having disavowed any intention to be bound by the material handling scenarios it presented, and Mr. Jamieson relied on, have made this issue moot. It appears that LBEC exhibits 701 and 702 are pure fiction, and were never intended for use. It should be noted that a similar situation arose prior to the first evidentiary hearing in this contested case November, 2009; wherein LBEC disavowed its intention to use a proposed subsidiary, Las Brisas Terminal Company for its material handling.

LBEC has again failed to meet its burden of proof on the issues ordered by the Commissioners' July 1 Interim Order.

## **II. Applicant's Exceptions misstate BACT limits for mercury**

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<sup>7</sup> Footnote 3, *supra*

<sup>8</sup> Jamieson August 25, 2010 Second Modeling Audit, p.2

<sup>9</sup> December 1 PFD, p. 21


Applicant has argued that it will accept the mercury limits set by the Commissioners in the White Stallion Energy Center contested case; which is contrary to the analysis and reasoning of the ALJs in their December 1 PFD.<sup>10</sup> As pointed out by the ALJs, White Stallion is authorized to burn *coal*, as well as pet coke; whereas, LBEC has represented to the Commissioners it will burn *only pet coke*. Consequently the ALJ's analysis of BACT for mercury in a facility burning *only pet coke*, is the only correct analysis.

### III. Conclusion

CEC urges the Administrative Law Judges and the Commissioners to reject the specious arguments of LBEC, and act to finally deny its requested permits.

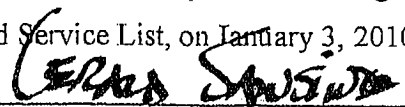
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### Certificate of Service

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Gerald Sansing

<sup>10</sup> December 1 PFD p. 44 and 48

SOAH Docket No. 582-09-2005  
TCEQ Docket No. 2009-0033-AIR  
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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

2011 JAN -3 PM 4: 25

CHIEF CLERKS OFFICE

## FAX COVER SHEET

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From: Gerald A. Sansing, Chairman, Clean Economy Coalition  
Client/Matter: Docket Number 2009-0033-AIR  
Date: January 3, , 2011

DOCUMENTS	13

COMMENTS: My attempts to E-File were unsuccessful. Therefore, I am Faxing this prior to the deadline.

Gerald Sansing

